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Court Rejects Emission 'Trades'

EPA Effort to Limit Mercury Output Is Said to Ignore Law

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A federal appeals court yesterday threw out the [Environmental Protection Agency's](#) approach to limiting mercury emitted from power-plant smokestacks, saying the agency ignored laws and twisted logic when it imposed new standards that were favorable to plant owners.

The ruling, issued by the [U.S. Court of Appeals](#) for the D.C. Circuit, was another judicial rejection of the Bush administration's pollution policies. It comes less than a year after the [U.S. Supreme Court](#) rebuked the administration and the EPA for refusing to regulate greenhouse gases.

This court's critique -- which undid a controversial program to "trade" emissions of mercury, a potent neurotoxin -- was especially sharp. It compared the EPA to the capricious Queen of Hearts in "Alice's Adventures in Wonderland," saying the agency had followed its own desires and ignored the "plain text" of the law.

"What the administration did when they came in was to essentially try to torpedo environmental regulations," said James Pew, a lawyer with the activist group Earthjustice who worked on the case. "This really is a repudiation of the Bush administration's environmental legacy."

Coal-fired power plants are responsible for about a third of the country's total mercury emissions. In the Washington area, mercury pollution in waterways has triggered advisories against consuming too much fish from the [Chesapeake Bay](#), the [Potomac River](#) and other bodies of water.

[Virginia](#) and [Maryland](#), home to most of the area's power plants, have set statewide mercury limits more stringent than the EPA standards. But scientists say the Washington area is still particularly vulnerable to

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mercury pollution because of wind patterns that carry power plant emissions here from the Midwest.

"We happen to be kind of on the ground zero," said Tom Burke, a professor at [Johns Hopkins University](#)'s school of public health. He said, though, that many residents eat much less than their limit of locally caught seafood.

The EPA responded to yesterday's ruling by saying that the ruling wiped out a valuable program that would have reduced mercury emissions by 70 percent.

"We have now no control over existing power plants, which should be of concern to the American people," EPA spokesman Jonathan Shrader said. He said the agency would study the ruling before deciding whether to appeal.

The decision was also condemned -- and on similar grounds -- by the electric power industry.

"Ironically, with their aggressive litigation posture, the environmental community and their state allies have again caused uncertainty and delay in regulating mercury," said Scott Segal, a coal industry lobbyist at the firm Bracewell & [Giuliani](#).

Mercury, a byproduct of burning coal, is an environmental problem because it drops out of the air and accumulates in rivers and streams, winding up stored in the tissue of fish. If the fish are eaten by expectant mothers or children, the metal can cause serious developmental problems in a child's brain.

The case decided yesterday turned on a highly contentious EPA decision from 2005. The agency proposed a "cap-and-trade" program, in which plants were required to reduce their mercury output to a certain level -- or buy credits from plants with emissions below those levels. That rule was to go into effect in 2010.

But environmentalists objected. They said that if a plant were allowed to buy its way out of some cutbacks, the result could be a "hot spot" of pollution in nearby areas.

"There will be neighborhoods that get little or no reduction" in pollution if their local plants take no measures to curb emissions, said Carol M. Browner, the EPA administrator under President [Bill Clinton](#).

After the EPA's decision, a coalition of activist groups and state officials sued. Their argument was that the EPA violated the terms of a clear mandate from Congress -- that all plants be outfitted with the best available technology to cut emissions.

Yesterday, the appeals court agreed.

The EPA "deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text" of Congress's order. In [Lewis Carroll](#)'s book, the queen hands out punishments without bothering to justify them, declaring, "Sentence first -- verdict afterwards."

The EPA "actually must follow the law," said [Maryland Attorney General Douglas F. Gansler](#) (D). Maryland was one of the states suing the agency. "They have to go back to their job of protecting the environment . . . and putting controls on coal-burning power plants."

But power companies said that without a rule in place, pollution cutbacks could stall.

[American Electric Power](#), for instance, is one of the country's two largest producers of coal-fired electricity. Spokesman Pat Hemlepp said the company had spent \$2.6 billion to install technology designed to catch sulfur dioxide and nitrogen oxides, pollutants that are precursors to smog. Those devices cut mercury emissions, as well.

But now, Hemlepp said, the company will postpone purchases of equipment aimed at reducing mercury emissions even further to meet the cap-and-trade targets.

"It doesn't make sense to spend the additional \$170 million . . . and risk EPA putting something in place that will require a different control on those plants," Hemlepp said.

Whatever the environmental impact, [University of Maryland](#) law professor Robert Percival saw a clear legal signal in yesterday's decision. He said the judges showed surprising pique at the Bush administration.

"It's fairly clear that even judges that are, you know, not that fond of environmental regulation are kind of appalled at how willing the [administration] has been to try to bend the law," said Percival, who heads the school's environmental law program.

Staff researcher Karl Evanzz contributed to this report.

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